Public Prosecutor v Darkasyi & Anor

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO (MT-1) 44-06 OF 2001
SYED AHMAD HELMY JC
3 JULY 2002

Criminal Law *— Dangerous Drugs Act (Malaysia) — ss 39B, 41A — Whether sessions court was the appropriate forum in which the accused persons were to be produced and charged*

Criminal Procedure *— Transfer of cases — Whether subordinate court has power to postpone the transfer of the case to the High Court*

On 6 April 2001, the applicants were arrested. They were subsequently produced in the Sessions Court, Johor Bahru, where they were charged with an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act'). The charge was read to the applicants but no pleas were taken from them. The prosecuting officer asked for a postponement to enable the prosecution to obtain the chemist report before the Public Prosecutor would issue a consent and requisition for the matter to be transferred to the High Court for trial. The sessions court judge allowed the postponement and extended the remand of the applicants for two months. The applicants made an application against the decision of the sessions court judge, ordering the extension of the applicants' remand until 20 September 2001. The issues were whether the sessions court was the appropriate forum in which the accused were to be produced and charged and whether the appropriate court has the power to postpone the transfer of the matter to the High Court when an accused person is first brought before it.

Held, dismissing the applicants' application in encl 3:

(1) The term 'subordinate court' is defined under s 2 of the Act as having the meaning assigned thereto in s 3 of the Courts of Judicature Act 1964 ('the CJA'). Section 3 of the CJA further defines 'subordinate courts' to mean 'any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court and means in relation to the High Court any such court as by any written law has jurisdiction within the local jurisdiction of the High Court'. From the definition given above, the term 'subordinate court' being an inferior court would include both the sessions court as well as the magistrate's court (see p 174F–G).

(2) The contention of counsel for the applicant that s 177A of the Criminal Procedure Code ('the Code') specifically prescribes the magistrate's court as the appropriate forum for the accused to be produced and thereafter transmitted to the High Court cannot be acceded to. The procedure of transmission of a case in respect of any offence under the Act to trial by High Court is governed by

A s 41A of the Act and not s 177A of the Code. Section 41A of the Act expressly provides that whenever an accused person is charged under s39B of the Act which is triable exclusively by the High Court, he shall be produced before the appropriate subordinate court, ie either the magistrate's or sessions court and the charge read and explained to him. Section 41A provides that B sub-ss (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary. Applying the principle of *generalibus specilia derogant*, s 41A of the Act, being a special provision, overrides s 177A of the Code (see p 175C–F).

(3) On the second issue, the subordinate court has the power to C postpone the case and remand the accused pending the production of the consent and requisition of the Public Prosecutor. Once the consent and requisition is produced by the Public Prosecutor, the subordinate court shall transfer the case and cause the accused to appear before the High Court as soon as may be practicable (see p 176E–F).

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[Bahasa Malaysia summary

Pada 6 April 2001, pemohon-pemohon telah ditangkap. Mereka kemudian dibawa ke Mahkamah Sesyen, Johor Bahru, di mana E mereka dituduh dengan kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pertuduhan telah dibaca kepada pemohon-pemohon tetapi tiada akuan yang telah diambil daripada mereka. Pegawai pendakwaan telah memohon penangguhan untuk membolehkan pihak pendakwaan memperolehi laporan ahli kimia sebelum Pendakwa Raya dapat mengeluarkan keizinan dan rekuisisi F untuk membolehkan perkara tersebut dipindahkan ke Mahkamah Tinggi untuk perbicaraan. Hakim mahkamah sesyen telah membenarkan penangguhan kes tersebut dan telah melanjutkan tahanan pemohon-pemohon selama dua bulan. Pemohon-pemohon telah membuat permohonan terhadap keputusan hakim mahkamah sesyen tersebut memerintahkan perlanjutan tahanan pemohon-G pemohon sehingga 20 September 2001. Isu-isu adalah sama ada mahkamah sesyen merupakan forum sesuai di mana orang-orang tertuduh patut dibawa dan dituduh dan sama ada mahkamah sesuai mempunyai kuasa untuk menangguh pemindahan perkara tersebut kepada Mahkamah Tinggi apabila seorang tertuduh dibawa ke hadapannya buat kali pertama.

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Diputuskan, menolak permohonan pemohon-pemohon di dalam lampiran 3:

(1) Terma 'subordinate court' ditafsirkan di bawah s 2 Akta tersebut sebagai mempunyai maksud di dalam s 3 Akta Mahkamah I Kehakiman 1964 ('AMK'). Sesyen 3 AMK menaksirkan 'subordinate court' sebagai 'any inferior court from the decisions of which by reason of any written law there is a right of appeal to

the High Court and means in relation to the High Court any such court as by written law has jurisdiction within the local jurisdiction of the High Court'. Daripada taksiran yang diberi di atas, terma 'subordinate court' sebagai sebuah mahkamah rendah adalah termasuk mahkamah sesyen dan mahkamah majistret (lihat ms 174F–G).

(2) Pernyataan peguam pemohon bahawa s 177A Kanun Acara Jenayah ('Kanun tersebut') khusus menentukan mahkamah majistret sebagai forum yang sesuai untuk orang tertuduh dibawa and setelah itu dipindahkan ke Mahkamah Tinggi tidak dapat dipersetujui. Prosedur pemindahan kes berhubung dengan sebarang kesalahan di bawah Akta tersebut kepada perbicaraan di Mahkamah Tinggi dikawal oleh s 41A Akta tersebut dan bukan s 177A Kanun tersebut. Seksyen 41A Akta tersebut jelas memperuntukkan bahawa apabila seorang tertuduh dituduh di bawah s 39B Akta tersebut yang dibicarakan sepenuhnya oleh Mahkamah Tinggi, beliau akan dibawa ke mahkamah rendah yang sesuai, iaitu sama ada mahkamah majistret atau sesyen dan pertuduhan tersebut akan dibaca dan diterangkan kepada beliau. Seksyen 41A memperuntukkan bahawa subseksyen-subseksyen (1), (2) dan (3) akan berkuat kuasa walaupun terdapat undang-undang bertulis lain yang bercanggah. Memakai prinsip *generalibus specilia derogant*, s 41A Akta tersebut, yang merupakan peruntukan khas, mengatasi s 177A Kanun tersebut (lihat ms 175C–F).

(3) Mengenai isu kedua, mahkamah rendah mempunyai kuasa untuk menangguhkan kes tersebut dan menahan tertuduh sementara menunggu keizinan dan rekuisis Pendakwa Raya. Apabila keizinan dan rekuisisi telah diberi oleh Pendakwa Raya, mahkamah rendah akan memindahkan kes dan akan mengarahkan tertuduh untuk hadir di hadapan Mahkamah Tinggi secepat mungkin (lihat ms 176E–F).

Notes

For cases on ss 39B, 41A of the Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4h Ed, 2000 Reissue), para 159.

For cases on transfer of cases, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3778–3811.

Cases referred to

PP v Chew Siew Luan [1982] 2 MLJ 119 (refd)
PP v Lee Chan Sang [1989] 1 MLJ 224 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3
Criminal Procedure Code ss 177A, 388, Chapter XX

A Dangerous Drugs Act 1952 ss 2, 39B, (3), (4), 41A, (1), (2), (3), 41B(1)(a)
Federal Constitution art 145(3)
Teo Say Eng (Attorney-General's Chambers) for the prosecution.
Gobind Singh Deo (*Karpal Singh & Co*) for the applicants.

B **Syed Ahmad Helmy JC**: The application herein is against the decision of the Sessions Court Judge in Johor Bahru made on 17 July 2001 ordering the extension of the applicant's remand until 20 September 2001.

The factual matrix reveals that the applicants were arrested on 6 April 2001. They were subsequently produced in the Sessions Court, Johor C Bahru, where they were charged with an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act').

The charge was read to the applicants. No plea was taken from them. The prosecuting officer informed the sessions court that the prosecution has yet to obtain the chemist report. As such, the prosecuting officer asked for a postponement to enable the prosecution to obtain these reports before the D Public Prosecutor would issue a consent and requisition for the matter to be transferred to the High Court for trial.

The sessions court judge allowed the postponement and extended the remand of the applicants for a further two months.

The applicants are challenging both the forum of the sessions court and E its power to postpone the transfer of the matter to the High Court after an accused person is first brought before it.

Two issues were placed before the court for determination, namely:

(a) whether the sessions court was the appropriate forum in which the accused were to be produced and charged; and

F (b) whether the appropriate court has the power to postpone the transfer of the matter to the High Court when an accused person is first brought before it.

The determination of the issues aforesaid would invariably involve an appraisal of the relevant provisions of the Act.

G Section 41A of the Act deals with special provisions relating to the transmission of a case to, and trial by, the High Court. It reads as follows:

(1) Where any case in respect of an offence under this Act *is triable exclusively* by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before *the appropriate subordinate court* which shall, after the charge has been H explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

I (2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.

(3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.

(4) The provisions of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary. (Emphasis added.)

It is the applicants' contention that the subordinate court referred to must relate to the magistrate's court for the reason that since sub-s (2) of s 41A of the Act stipulates the requirement, such transfers are to be held in accordance with Ch XX of the Criminal Procedure Code ('the Code'), which by s 177A thereof requires the production of the accused before a magistrate's court, it follows that the appropriate court cannot be the sessions court.

The learned prosecutor contends that the phraseology 'appropriate court' in s 41A of the Act must be interpreted to mean either the sessions court or the magistrate's court whichever is appropriate for the reason that the definition of subordinate court under s 2 of the Act is assigned the same meaning as laid down by s 3 of the Courts of Judicature Act 1964 ('the CJA') where the term is defined as 'any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court and means in relation to the High Court any such court as by any written law has jurisdiction within the local jurisdiction of the High Court'. By reason thereof, the applicants production before the sessions court is the correct forum.

The offence for which the applicants herein are being charged relates to dangerous drugs, the statutory provisions regulating such offences would be the Act and s 41A thereof is the regulatory provision pertaining to the transmission of cases to the High Court for trial in cases involving dangerous drugs.

The term 'subordinate court' is defined under s 2 of the Act as having the meaning assigned thereto in s 3 of the CJA. Section 3 of the CJA further defines 'subordinate courts' to mean 'any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court and means in relation to the High Court any such court as by any written law has jurisdiction within the local jurisdiction of the High Court'.

From the definition given above, it is my considered view that the term 'subordinate court' being an inferior court would include both the sessions court as well as the magistrate's court.

The word 'appropriate' which qualifies 'subordinate court' lands credence to my view aforesaid. *Cambridge International Dictionary of English* defines the word 'appropriate' to mean 'suitable or right for a particular situation or occasion'. Thus it follows that the phrase appropriate subordinate court given its ordinary meaning would mean any subordinate court, either sessions court or magistrate's court which is suitable for a particular situation. The construction aforesaid is further supported by the late Professor Mimi Kamariah where in her book *Dangerous Drugs Laws*,

A Malayan Law Journal Sdn Bhd, (1995 Ed) at p 49 in dealing with s 41A of the Act she was of the view that such an accused person may be brought before either the magistrate's or sessions court.

In this connection, it is pertinent to note that the Public Prosecutor by virtue of the power vested in him under ss 41A and 39B(3) and (4) of the B Act and pursuant to art 145(3) of the Federal Constitution is empowered to choose the forum for the transmission of the case to the High Court for trial.

In any event, whichever forum an accused is produced for the transmission of his case to the High Court will not prejudice him in anyway. Section 41A only confers jurisdiction on the subordinate court to receive C the production of any accused person, to have the charge explained to him and to transmit his case to the High Court — it does not confer any power to the sessions court or the magistrate's court to record any plea from the accused person.

The strenuous contention of counsel for the applicant that s 177A of D the Code specifically prescribes the magistrate's court as the appropriate forum for the accused to be produced and thereafter transmitted to High Court, cannot be acceded to. I say so because s 177A of the Code is not applicable in this case as the procedure of transmission of a case in respect of any offence under the Act to trial by the High Court is governed by s 41A of the Act and not s 177A of the Code, as s 41A of the Act expressly provides E that whenever an accused person is charged under s 39B of the Act which is triable exclusively by the High Court, he shall be produced before the appropriate subordinate court, ie either the magistrate's or sessions court and the charge read and explained to him. Thereafter, the case is transmitted to the High Court. Section 41A provides that sub-ss (1), (2) and (3) shall have effect notwithstanding any other written law to the F contrary. Applying the principle of *generalibus specialia derogant*, s 41A of the Act, being a special provision, overrides s 177A of the Code (see also *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119).

Second issue

G Whether the 'appropriate court' has the power to postpone the transfer of the matter to the High Court when an accused is first brought before it.

In determining the issue aforesaid, it is essential to advert to the relevant provisions of the Act, namely ss 41A(1) and 39B(3) and (4) thereof.

H The interpretation of all the three subsections read as a whole would be as follows: under s 41A(1) whenever an accused person is charged with an offence which is required by the Public Prosecutor to be tried by the High Court, he shall be produced before an appropriate subordinate court, ie a magistrate's court or sessions court.

Upon production as aforesaid, the charge will be read and explained to I him but no plea will be taken from him as the subordinate court will have no jurisdiction to take a plea from an accused person under s 41A(1) of the Act; *Public Prosecutor v Lee Chan Sang* [1989] 1 MLJ 224.

Though s 41A(1) talks of transmission after the charge is read and explained, nevertheless it is predicated by the issuance of a consent and requisition of the Public Prosecutor as provided for by s 39B(3). A

It is only upon the consent and requisition being produced in court pursuant to s 39B(3) will the subordinate court embark on transmitting the case to High Court and 'cause the accused person' to appear or be brought before the High Court 'as soon as may be practicable' pursuant to ss 39B(3) and 41A(1) of the Act. B

The power of the transmission of a case to the High Court of the subordinate court is dependent on the production of the consent and requisition of the Public Prosecutor.

According to s 39B(4) of the Act, when an accused is brought before a subordinate court before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly. C

Both the accused persons herein are charged under s 39B of the Act which carries a mandatory death sentence. The said offence is rendered unbailable under s 41B(1)(a) of the Act. D

By reason thereof, a subordinate court is empowered under s 41B(1)(a) of the Act, to be read with s 388 of the Code, to remand both the accused persons pending the issuance of the consent and requisition by the Public Prosecutor. E

It follows that the subordinate court has the power to postpone the case and remand the accused pending the production of the consent and requisition of the Public Prosecutor. Once the consent and requisition is produced by the Public Prosecutor, the subordinate court shall transfer the case and cause the accused to appear before the High Court as soon as may be practicable. F

By reason of the aforesaid, I accordingly dismiss the applicants' application in encl 3.

Applicants' application in encl 3 dismissed.

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Reported by Chew Phye Aun

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